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IN THE

Supreme Court of the United States

October Term 1968

No. 65

TIMOTHY F. LEARY,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional, Statutory and Regulatory Provisions Involved	2
Statement	3
Summary of Argument	5
ARGUMENT:	
I. The Fifth Amendment privilege against self-incrimination bars conviction under 26 U.S.C. § 4744(a) for failure to pay the tax imposed upon a transferee of marihuana	6
A. The Self-Incriminatory Nature of the Statutes Under Which Petitioner was Convicted	6
1. The Statutory Scheme	8
2. Possible Constructions of the Statutory Scheme	9
3. Incriminatory effect if registration and special tax inapplicable but transfer tax applicable to illegal possessors	9
4. Incriminatory Effects if all Provisions Apply to Illegal Possessors	11
5. The Government's Statutory Construction: No Provisions apply to illegal Possessors except criminal sanctions	12
6. Summary	15

PAGE

B. Petitioner did not waive his privilege by taking the stand in his own defense 16

C. This Court Should Not Attempt to Save the Constitutionality of This Statute by Imposing Restrictions on the Use by State and Local Prosecutors of the Information Obtained as a Consequence of Compliance With the Statutory Scheme 17

D. A Determination in Petitioner's Favor on This Issue Should Serve to Reverse His Conviction on Both Counts 18

II. Petitioner was denied due process under the Fifth Amendment by the application, under the circumstances of this case, of the provisions of 21 U.S.C. § 176a, providing that an inference may be drawn respecting the illegal origin and nature of marihuana and knowledge thereof solely from possession 19

A. The 21 U.S.C. § 176(a) Presumption is Arbitrary and Unreasonable 20

B. As Construed and Applied by the Lower Courts, Under the Circumstances of This Case, the Presumption Eliminated the Elements of Illegal Transportation and Knowledge Thereof from the Statute 24

1. Elimination of the elements of illegal importation and knowledge thereof from the Statute 24

2. Failure to provide guidelines for the words "to the satisfaction of the jury" 27

CONCLUSION 28

Table of Citations

CASES

PAGE

Chavez v. *United States*, 343 F.2d 85 (9th Cir. 1965) 19n, 22n, 26, 27

Erwing v. *United States*, 323 F.2d 674 (9th Cir. 1963) 22n

Griego v. *United States*, 298 F.2d 845 10th Cir. 1962) 19n, 22n

Grosso v. *United States*, 390 U.S. 62 (1968) .. 2, 4, 5, 6, 8, 17, 17n

Harris v. *United States*, 359 U.S. 19, 23 (1959) 19n

Haynes v. *United States*, 390 U.S. 85 (1968) 2, 4, 5, 6

Marchetti v. *United States*, 390 U.S. 39 (1968) 2, 4, 5, 6, 7, 17, 17n, 18

Murphy v. *Waterfront Commission*, 378 U.S. 52 (1964) 17

Roviaro v. *United States*, 353 U.S. 53 (1957) 22n

Symons v. *United States*, 178 F.2d 615 (9th Cir. 1949) 20

Tot v. *United States*, 319 U.S. 463 (1943) 6, 20, 21

United States v. *Gainey*, 380 U.S. 63 (1965) 20

United States v. *Peeples*, 377 F.2d 205 (2nd Cir. 1967) 26

United States v. *Romano*, 382 U.S. 136 (1965) 21

Yee Hem v. *United States*, 268 U.S. 178 (1925) .. 20, 22

Constitutions, Statutes and Regulations

Constitution of the United States:

	PAGE
Amendment V	2, 16, 20, 24

Statutes of the United States:

21 U.S.C. § 174	19n, 20
21 U.S.C. § 176a	2, 3, 4, 5, 7, 16, 18, 19, 20
26 U.S.C. § 4741	2, 5, 8, 10, 11n, 13, 18
26 U.S.C. § 4742	2, 5, 8, 8n, 13, 13n
26 U.S.C. § 4744	2, 3, 5, 6, 8, 8n, 10, 14, 14n, 16, 19, 25n
26 U.S.C. § 4751	11, 13, 15
26 U.S.C. § 4753	11
26 U.S.C. § 4754	9
26 U.S.C. § 4773	8, 8n
26 U.S.C. § 4775	9, 11

Treasury Regulations:

26 C.F.R. 152.66	8n, 13n

Miscellaneous

Reports of the Commissioner of Internal Revenue, 1960-67	9
Reports of the Commissioner of Internal Revenue, 1952-1967	17n
Hearings on H.R. 6385 before the Committee on Ways and Means, 75th Cong. 1st Sess.	12n
1956 U.S. Code Cong. and Adm. News	14n, 20
President's Commission on Law Enforcement and the Administration of Justice: A Task Force Report: Narcotic and Drug Abuse (1967)	18n

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit (App. A, 1a-36a), is reported at 383 F.2d 851 (1967); its opinion denying Petitioner's application for rehearing is reported at 392 F.2d 220 (1968) (App. B, 37a-40a). The Court of Appeals affirmed the judgment of the District Court for the Southern District of Texas, Laredo Division. No opinion was rendered by the District Court.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on September 29, 1967 (App. C, 41a). On October 20, 1967, an application was made for rehearing. The application was denied in a decision dated March 29, 1968 (App. B, 37a-40a). The petition for writ of certiorari was filed on April 27, 1968, and was granted on June 10, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Petitioner has been convicted and sentenced to a maximum prison term of 30 years and fined $40,000, subject to the provisions of 18 U.S.C. § 4208(b), for offenses relating to his alleged possession of less than one-half ounce of marihuana (R. 640-44). Specifically, Petitioner was found guilty of violating 21 U.S.C. § 176a (unlawfully and knowingly transporting illegally imported marihuana, with knowledge of illegal importation and intent to defraud) and 26 U.S.C. § 4744(a)(2) (unlawfully and knowingly transporting marihuana, as a transferee required to pay the transfer tax, without having paid such tax (R. 44, 45, 637-638)).

The questions presented herein are:

I. Whether the provisions of 26 U.S.C. §§ 4741(a), 4742 and 4744(a), as applied to Petitioner, violate his privilege against self incrimination protected by the Fifth Amendment to the United States Constitution and his rights thereunder as amplified by this Court in three recently decided cases: *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968); and *Haynes* v. *United States*, 390 U.S. 85 (1968).

II. Whether Petitioner was denied due process under the Fifth Amendment by the application, under the circumstances of this case, of the provisions of 21 U.S.C. § 176a, providing that an inference may be drawn respecting the illegal origin and nature of marihuana, and Petitioner's knowledge thereof, solely from the possession of marihuana.

Constitutional, Statutory and Regulatory Provisions Involved

The Constitutional, Statutory and Regulatory provisions involved (Amendment V to the Constitution, 21 U.S.C. § 176a; 26 U.S.C. §§ 4741-44, 4751-55, 4773, and 4775; 26 C.F.R. 152.61-152.68) are set forth in Appendix E at pp. 43a-57a.

Statement

The conviction of Petitioner and the substantial jail sentence he faces arise out of a round-trip automobile journey lasting less than one hour, across the International Bridge connecting Laredo, Texas with Mexico (R. 70, 71, 315).* The testimony upon the trial disclosed that Petitioner, on December 22, 1965, had driven, with four passengers, south across the International Bridge to the Mexican Customs Station and, without leaving the Station, and after apparently being denied entry, returned northward across the bridge (R. 74, 137-38, 315-328). Petitioner was stopped at the American Customs Station on his return and he and the other passengers, including his eighteen year old daughter, were thoroughly searched (R. 74-75, 109, 331-333). Sweepings of marihuana were found in the rented automobile and a small quantity was found on the person of Petitioner's daughter. A total of less than one-half ounce of marihuana was thus discovered (R. 173, 176-185).

Petitioner was charged with (1) violating 21 U.S.C. § 176a—transporting illegally imported marihuana; (2) violating 26 U.S.C. § 4744(a)(2)—transporting or concealing marihuana upon which a transfer tax has not been paid; and (3) smuggling marihuana.

Upon trial, the District Court, over the prosecution's objection, withdrew the charge of smuggling, it being clear that no evidence was presented to justify an inference that Petitioner had acquired the small quantity of marihuana during his short stay in the Mexican Customs Station (R. 4, 593). Rather, the only pertinent testimony disclosed that the marihuana had been acquired by Petitioner in New York (R. 133, 155-156, 313, 349, 357).

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* References in parentheses following the letter "R" are to pages of the Record where the cited material has not been reproduced in full in the Appendix.

It was urged on behalf of Petitioner that the same reasoning applicable to the dismissal of the smuggling count, *i.e.*, his lack of importation of marihuana, should serve to compel the withdrawal of the transportation charge. The District Court, however, in its charge to the jury, took the position that Petitioner's testimony that he had knowingly possessed marihuana during the trip to Mexico, together with the presumption of illegal importation which arises from mere possession under 26 U.S.C. § 176a formed a sufficient basis for conviction (App. F, 102a-104a).

In connection with this presumption of illegal importation arising solely from the possession of marihuana, Petitioner specifically denied any knowledge as to whether the marihuana was imported or was grown domestically. In addition to urging the basic unfairness and incriminatory nature of the presumption Petitioner also attempted to show its arbitrary and irrational nature through testimony —both of Petitioner's witnesses and of a government witness—as to the widespread growth of marihuana and as to the quantity of domestically grown marihuana as opposed to imported marihuana (R. 164-165, 185-187, 496-502, 516-517). The District Court, however, while affirmatively conceding that marihuana is readily grown in the United States (R. 187), refused to allow any detailed testimony as to the relative quantity thereof (R. 165, 517).

With respect to the tax provisions contained in Title 26 of the U.S. Code, Petitioner, in his motion for a new trial, asserted that the statutes violated his constitutional privilege against compulsory self-incrimination (R. 651).

On appeal, the Court of Appeals for the Fifth Circuit, affirmed the judgment of conviction in all respects (App. A, 1a-36a). During the pendency of a petition for rehearing, the Court rendered its decisions in *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968); and *Haynes* v. *United States*, 390 U.S. 85

(1968). The Court of Appeals denied the Petition for Rehearing (App. B, 37a-40a).

The Court granted *certiorari* on June 10, 1968, limited to the two questions presented.

Summary of Argument

I. *Marchetti* v. *United States,* 390 U.S. 39, *Grosso* v. *United States,* 390 U.S. 62, and *Haynes* v. *United States,* 390 U.S. 85, are applicable to the provisions of 26 U.S.C. §§ 4741(a)(2), 4742 and 4744(a).

These provisions require a person, whose possession of marihuana is a crime under state law: (1) to request an order form from the Secretary of the Treasury indicating therein an intention to acquire marihuana, and (2) to pay a tax upon the acquisition of such marihuana. The information thus supplied is available to federal, state, and local law enforcement officers. Requiring an individual, upon pain of criminal sanction, to take action which may directly give rise to criminal prosecution against him violates his privilege against self-incrimination—which privilege becomes available to him as a substantive defense to prosecution. Petitioner has not waived his privilege.

The trial judge's charge allowed the jury to convict Petitioner of a violation of § 176a based upon his failure to pay the transfer tax required by § 4741. Thus, irrespective of the Court's ultimate determination of Question II, a determination reversing Petitioner's conviction under § 4744 must also serve to require a reversal of his conviction under § 176a.

II. Petitioner was denied due process by the application of the presumption contained in 21 U.S.C. § 176a, in lieu of evidence of the elements essential to a finding that he had violated the provisions of that section.

In view of the fact that marihuana is widely grown throughout the United States, the presumption that any particular quantity of marihuana is imported is conjectural and arbitrary and thus fails to comport with the standards established by the Court in *Tot* v. *United States*, 319 U.S. 463 (1943).

In the alternative, as construed and applied by the courts below to the circumstances of this case, the presumption eliminated the statutory elements of illegal importation and knowledge thereof from the statute and turned Petitioner's trial into a test of the legality of his possession rather than a trial of the crime charged.

ARGUMENT

I. The Fifth Amendment privilege against self-incrimination bars conviction under 26 U.S.C. § 4744 (a) for failure to pay the tax imposed upon a transferee of marihuana.

A. The Self-Incriminatory Nature of the Statutes Under Which Petitioner Was Convicted

The issue is not whether marihuana taxes may be validly imposed and collected, but whether the privilege against self-incrimination provides a full defense to a prosecution for failure to pay the $100 per ounce transfer tax. It is submitted that the statutory scheme whereunder Petitioner was convicted is predicated upon self-incriminatory conduct to no less a degree than the statutory schemes involved in *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968); and *Haynes* v. *United States*, 390 U.S. 85 (1968). Under the laws of virtually every state, including New York and Texas, the

mere possession or control of marihuana is a crime;[1] and under federal law, such possession is sufficient evidence to authorize conviction under 21 U.S.C. § 176a, or at the minimum (if Point II herein is upheld) such possession "would surely prove a significant 'link in the chain' of evidence tending to establish . . . guilt" (*Marchetti v. United States, supra,* at 48).

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[1] See, e.g., Ala. Code, Tit. 22, §§ 256-258 (1958); Alaska Stat. §§ 17.10.010-17.10.240 (1962); Ariz.Rev.Stat. §§ 36-1001 to 36-1024 (1956); Ark.Stat. §§ 82-1001 to 82-1024 (1947); Cal.Health and Safety Code, §§ 11001-11853 (1964); Colo.Rev.Stat. §§ 48-5-1 to 48-5-22 (1953); Conn.Gen.Stat. §§ 19-244 to 19-268 (1958); Del.Code Ann., Tit. 16, §§ 4701-4722 (1967); Fla.Stat.Ann. §§ 398.01-398.24 (1963); Ga.Code Ann. §§ 42-801 to 42-822, 42-9917 to 42-9919 (1957); Hawaii Rev.Laws §§ 52-10 to 52-39 (1955); Idaho Code §§ 37-2301 to 37-2323 (1957); Ill., S.H.A., c. 38, §§ 22-1 to 22-49 (1964); Ind.Stat.Ann. §§ 10-3501 to 10-3552 (1956); Iowa Code Ann. §§ 204.1-204.25 (1946); Kan.Stat. Ann. c. 65, Art. 25 (1963); Ky. Rev.Stat. §§ 218.010-218.240 (1962); La. Stat.Ann. 40:961-40:984 (1951); Me.Rev.Stat.Ann., Tit. 22, §§ 2361-2380 (1964); Md.Ann.Code, Art. 27, §§ 276-306 (1957); Mass.Ann.Laws, c. 94, §§ 197-217E (1957); Mich.Comp.LawsAnn. §§ 335.51-335.77 (1961); Minn.Stat.Ann. §§ 618.01-618.25 (1963); Miss.Code Ann., Tit. 25, c. 2 (1942); Mo.Rev.Stat.Ann., c. 195 (1959); Mont.Rev.Codes Ann. §§ 54-101 to 54-128 (1947); Neb. Rev.Stat. §§ 28-451 to 28-472.01 (1943); Nev.Rev.Stat. § 453.010 et seq. (1963); N.H.Rev.Stat.Ann., c. 318-A, §§ 1-26 (1964); W.J. (1953); N.Y. Penal Law, §§ 220.00-220.45 (1967); N.C.Gen.Stat., c. 90, Art. 5 (1958); N.D.Cent.Code Ann. §§ 19-03-01 to 19-03-32 (1960); Ohio Rev.Code, §§ 3719.01-3719.36, 3719.99 (1953); Okla. Sta.Ann., Tilt. 63 §§ 466-469A (1963); Ore.Rev.Stat., Tilt. 37, c. 474 (1967); Pa.Stat.Ann., Tit. 35, §§ 780-1 to 780-31 (1964); R.I. Gen.Laws Ann. §§ 21-28-1 to 21-28-66 (1956); S.C.Code Ann. §§ 32-1461 to 32-1495 (1962); S.D.Code, Tit. 22, §§ 1301-1324 (1939); Tenn.Code Ann. §§ 52-1301 to 52-1323 (1966); Vernon's Ann.Tex.Pen.Code, Art. 725b (1961); Utah Code Ann. §§ 58-13-1 to 58-13a-48 (1953); Vt.Stat.Ann., Tit. 18, §§ 4141-4163 (1959); Va.Code Ann., Tit. 54, §§ 487-519 (1950); Wash-Rev.Code §§ 69.33.220-69.33.960 (1959); W.Va.Code Ann. §§ 16-8A-1 to 16-8A-26 (1961); Wis.Stat.Ann. §§ 161.01-161.25 (1957); Wyo.Stat. Ann., Tit. 35, §§ 348-371 (1957).

As the Court said in *Grosso*: ". . . the validity under the Constitution of criminal prosecutions for willful failure to pay the excise tax may properly be determined only after assessment of the hazards of incrimination which would result from 'literal and full compliance' with all the statutory requirements", 390 U.S. at 65.

1. The Statutory Scheme

A transfer tax is imposed "upon all transfers of marihuana" required to be effected with a written order form (§ 4741). Every transfer, except for a limited number of clearly lawful tranfers[2], must be effected with such an order form. These forms, executed by the transferee, must contain the name and address of the transferor and the transferee, and the amount of marihuana involved (§ 4742).[3] A copy of the order form is "preserved" in the internal revenue district, may be inspected by or furnished to state and local law enforcement officers, and "shall be admissible in evidence as an original" (§§ 4742, 4773).

Section 4744(a)(2), upon which Petitioner's conviction was based, makes it unlawful for a transferee "required to pay the transfer tax" to "transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana . . . acquired or obtained" without payment of the transfer tax. Possession of any marihuana and failure, on demand, to produce the order form is "presumptive evidence of guilt" and of liability for the transfer tax (§ 4744).

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[2] See § 4742(b) (App. E, pp. 45a-46a).

[3] In addition to the information required by § 4742(c), the application must show "if registered, the (transferee's) registration number" and "a description, including quantities, of the desired articles or materials to be transferred" (26 C.F.R. 152.66). The transferee's copy of the form must be retained by him "and preserved for a period of two years so as to be readily accessible to inspection" by said law enforcement officers (§§ 4742(d), 4773).

There is a sharp distinction in transfer tax rate based upon whether the transferee has registered and paid a special tax: a registered transferee pays a transfer tax of $1 per ounce; an unregistered transferee pays a transfer tax of $100 per ounce. The special tax is imposed annually as follows: $1 upon lawful occupational possessors; $24 upon manufacturers; and $3 upon "person(s) not otherwise taxed"—"who deals in, dispenses . . . or gives away marihuana" (§ 4751). "Any person" subject to the special tax must register with his local internal revenue district. Upon demand a registrant must provide the Secretary with a return, "verified by affidavits", setting forth for a three month period the quantities of marihuana received by registrant, the transferors and the dates of receipt (§ 4754). It is unlawful for any person required to register and pay the special tax to fail so to do (§ 4755). The written order forms and the registrant returns are available for inspection by federal, state and local prosecutors (§ 4775). The Secretary may furnish, to any person, a list of all special taxpayers upon payment of $1 for each 100 names or fraction thereof (§ 4777).

It is from this broad statutory tax scheme that the Government has, in recent years, collected total taxes as follows: 1960, $50,000; 1961, $48,000; 1962, $49,000; 1963, $68,000; 1964, $94,000; 1965, $77,000; 1966, $129,000; and 1967, $177,000 (Reports of the Commissioner of Internal Revenue, 1960-1967).

2. Possible Constructions of the Statutory Scheme

There are three possible constructions of this statutory scheme as applied to persons whose proposed possession of marihuana is probably unlawful:

(1) the special tax and registration provisions do not apply, but before acquiring marihuana such a transferee must obtain an order form and pay the $100 per ounce transfer tax; or

(2) all provisions must be complied with, *i.e.*, persons whose possession is probably unlawful, must pay the $3 per year special tax, register, and upon each acquisition of marihuana obtain an order form and pay the $1 per ounce transfer tax; or

(3) none of the provisions apply except for the criminal sanctions of Section 4744.

The choice between construction "1" and construction "2" depends upon the interpretation of the special tax category of "persons not otherwise taxed" (§ 4751(5)). If only possessors in lawful occupational groups not otherwise specifically mentioned are considered "persons not otherwise taxed," then unlawful possessors cannot pay the special tax and consequently cannot register, and construction "1" applies. If *all* possessors who are not in the occupational categories specifically mentioned in the special tax provision are considered "persons not otherwise taxed" then unlawful possessors must register and pay the special tax, and construction "2" applies. Construction "3" is discussed only because it is the Government's construction.

3. *Incriminatory effect if registration and special tax inapplicable but transfer tax applicable to illegal possessors*

If the registration and special tax provisions do not apply to persons whose proposed possession is or is likely to be unlawful, the sharp distinction in rate of tax in § 4741 becomes crucial. Persons whose possession of marihuana is clearly lawful pay the *$1* per ounce tax mandated by subdivision "1". Persons—including Petitioner—whose possession of marihuana is or is likely to be unlawful are required to pay the *$100* per ounce tax, thus incriminating themselves in clear and unmistakable fashion. So marked and specially designated, the $100 taxpayer, must concurrently obtain a written order form and provide incrimi-

natory information therein—which information is available to state and local law enforcement officers.

4. Incriminatory Effects if all Provisions Apply to Illegal Possessors

If the registration and special tax provisions are applicable to persons whose proposed possession is unlawful appreciable, if different, hazards of incrimination exist.[4] Under this construction, all lawful occupational possessors would pay an annual special tax of either $1 or $24, and the catch-all category of "other persons" with its exclusive $3 a year badge would apply to unlawful possessors (§ 4751). (It is unlawful for any person required to register and pay the special tax to fail to do so (§ 4755)).

For the "privilege" of paying the $1 per ounce rather than the $100 per ounce transfer tax, Petitioner is subjected to the following real and appreciable hazards of incrimination in addition to the written order form requirement:

(1) he must register (§ 4753(a));

(2) he must, at the Government's request, provide a return "verified by affidavits" setting forth his receipts, in any prior 3 month period, of marihuana, the quantities, the transferors, and the dates thereof (§ 4754);

(3) his returns are available to federal, state and local prosecutors (§ 4773);

(4) "any person" may obtain a governmentally certified copy of his name (§ 4775).

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[4] Since Petitioner was convicted for failure to pay the $100 per ounce transfer tax (§ 4741(a)(2)) and was not charged with failure to register and pay the special tax, it may not be essential for the Court, at this time, to decide whether all provisions of the statutory scheme must be complied with or whether only the order form and $100 per ounce transfer tax provisions must be complied with by persons whose proposed possession is probably unlawful.

5. *The Government's Statutory Construction: No provisions apply to illegal possessors except criminal sanctions*

In its Brief in Opposition to the Petition for Certiorari, the Government stated that its position is and always has been that unlawful possessors *cannot pay the transfer tax, cannot obtain order forms* and cannot register and pay the special tax (pp. 7-9). This statutory construction is inconsistent with both the legislative history and the plain meaning of the Marihuana Tax Act.

The Act was purposely drafted so as to permit *anyone* to obtain marihuana—provided he obtains an order form and pays a transfer tax.[5] To accomplish this objective

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[5] The drafters of the Act were concerned that if the Act were drafted so as to *preclude* transfers to persons whose possession was illegal the Act might be declared unconstitutional as an invalid attempt by Congress to regulate a subject matter reserved to the states. Clinton M. Hester, Assistant General Counsel to the Department of the Treasury in his testimony before the House Ways and Means Committee stated as follows:

> "[I]n order to obviate the possibility of a similar attack upon the constitutionality of this bill, it, like the National Firearms Act, permits the transfer of marihuana to nonregistered persons upon the payment of a heavy transfer tax. The bill would permit the transfer of marihuana to anyone, but would impose a $100 per ounce tax upon a transfer to a person who might use it for purposes which are dangerous and harmful to the public, just as the National Firearms Act permits a transfer of a machine gun to anyone but imposes a $200 tax upon a transfer to a person who would be likely to put it to an illegal use. . . .
>
> A person who wants to buy marihuana would have to go to the collector and get an order form in duplicate, and buy the $100 tax stamp and put it on the original order form there. He would take the original to the vendor, and keep the duplicate. If the purchaser wants to transfer it, the person who purchases the marihuana from him has to do the same thing and pay the $100 tax. That is the scheme that has been adopted to stop high-school children from getting marihuana." Hearings on H.R. 6385 before the Committee on Ways and Means; 75th Cong., 1st Sess. at 8, 14 (1937).

§ 4742 requires, without significant exception, an order form for *every* transfer "whether or not [the individual is] required to pay a special tax and register under sections 4751 to 4753. . . ." Section 4741 imposes a tax on "*all* transfers of marihuana which are required by section 4742 to be carried out in pursuance of written order forms. . . ."[6]

If the Government's statutory construction is accepted Petitioner urges summary reversal of his conviction on the following grounds:

(a) The Government has made it a crime and convicted Petitioner of failing to perform an act—payment of the § 4741 tax—which the Government makes it impossible for him to perform;

(b) The indictment which charged that Petitioner was "required to pay the transfer tax imposed by the Internal Revenue Code" (App. F, 60a-61a) was defective for the same reason;

(c) in the alternative, if the crime committed by Petitioner is not the failure to pay the tax but either (1) the act of *transportation,* or (2) the act of *concealment,* of marihuana upon which no order form can

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[6] The application for the order form, by Regulation, provides that "if registered", the transferee shall provide his registration number (26 C.F.R. 152.66), and thus contemplates—by administrative interpretation—nonregistration by certain transferees. Even if the form is not obtained, § 4741 apparently requires that the tax nevertheless be paid by the transferee: "Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in *violation of* section 4742 *without an order form* and without payment of the transfer tax imposed by this section, the transferor shall *also* be liable for such tax" (italics supplied).

be obtained nor transfer tax paid (§ 4744(a)(2)).[7] then:

(f) the § 4744 presumption of guilt arising from failure to produce the order form on demand (coupled with possession) is unconstitutional under the due process clause of the Fifth Amendment, because guilt, is presumed in part, based upon a defendant's failure to produce a Government document which the Government consistently refuses to furnish;[8] *or*

(ii) The Trial Judge failed to inform the jury of the impossibility of obtaining the order form and paying the transfer tax and thus of the *immateriality* as to both counts of the indictment of Petitioner's non-payment of the transfer tax; and

(iii) the criminal statute, is inapplicable to Petitioner and persons similarly situated (until

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[7] Section 4744 (a)(2) was added to the Marihuana Tax Act in 1956. The legislative history of that section indicates that transporting or concealing marihuana upon which no tax had been paid, was made a crime merely to facilitate prosecutions for the failure to pay the transfer tax. Under prior law only the acquisition of such marihuana was a crime. Because it was often difficult to prove that the marihuana was obtained in the jurisdiction where the defendant was apprehended, transportation and concealment were also made criminal acts so that venue would lie in both the jurisdiction where possession was discovered and in the jurisdiction where the marihuana was acquired. 1956 U.S. Code Cong. and Adm. News 3274, 76.

[8] In its brief in opposition to the Petition for Certiorari the Government stated as follows:

> "If on the face of an application for an order form it appears that the applicant is not lawfully registered—as would be the case with petitioner—the application and the tax tendered are immediately returned to the applicant" (Government's brief in Opposition to the Petition for Certiorari, p. 8).

the Court adopts said construction) by reason of the due process clause of the Fifth Amendment because the statutory system on its face did not give fair notice of the acts upon which criminal liability would ultimately be predicated.

6. Summary

In summary whatever construction is placed upon this statutory system, the conviction must be reversed. If all provisions of the system must be complied with by Petitioner, then the $1 per ounce tax is not a conclusive badge of criminality, but the payment duly recorded on an order form is an incriminating admission of possession, which admission is "preserved" so as to be available to prosecutors and admissible in evidence. The illegal possessor must register and pay a $3 special tax—a rate reserved only for "persons not otherwise taxed" (§ 4751(5)). Having registered, his name is available to the public on a list of special taxpayers, and he is compelled to supply the government with a verified report—available to prosecutors—of all of his recent receipts of marihuana. If the special tax and registration parts of the system are inapplicable to Petitioner but the transfer tax applies, then the $100 per ounce transfer tax must be paid. Under this construction and its premise that only persons whose possession is or is likely to be lawful can register and pay the special tax—not only is the fact of non-registration and non-payment of the special tax a mark of criminal activity—but the payment of the $100 (not the $1 "lawful") tax serves as a clear clarion call to conviction, duly documented in the written order form furnishable to prosecutors and admissible in evidence. If none of the provisions of the statutory "system" apply except for the criminal sanctions the conviction must be reversed on other grounds.

B. Petitioner Did Not Waive His Privilege by Taking the Stand in His Own Defense.

The Court of Appeals held that Petitioner by taking the stand and explaining his acquisition and transportation of marihuana waived his privilege (392 F.2d at 222). This holding is untenable. Petitioner testified as to the facts surrounding his possession of marihuana because of the presumption of illegality arising from his mere possession of marihuana under 21 U.S.C. § 176a. If defending himself against the importation count amounts to an effective waiver of the privilege with respect to the tax count, then the Fifth Amendment privilege can be destroyed simply by the Government's joinder of an importation count and a tax count.

Further, since the act penalized by § 4744(a) is the failure to take the self-incriminatory action of paying the tax, the privilege is a "full defense to prosecution"[9] rather than merely a right not to take the stand in a judicial proceeding. In this context the Fifth Amendment right is a substantive defense to the action, not a testimonial privilege.

The Government, in its Brief in Opposition to the Petition for Certiorari (pp. 4-6), stated that constitutional protection should be denied Petitioner because he believed the tax to be an unconstitutional imposition upon his religious beliefs and he thus would not have paid the tax even if the statute did not involve self-incrimination. To destroy the constitutional privilege upon such conjecture, is to reduce this fundamental right to nothing more than a procedural nicety.

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[9] *Haynes* v. *United States, supra* at 100.

C. This Court Should Not Attempt to Save the Constitutionality of This Statute by Imposing Restrictions on the Use by State and Local Prosecutors of the Information Obtained as a Consequence of Compliance With the Statutory Scheme.

This statutory scheme cannot be sustained by imposing restrictions upon the use, by federal, state and local authorities, of the information obtained as a consequence of compliance with the statute, *cf. Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964). The disclosure provisions contained in this statute, like the disclosure provisions contained in the wagering statute, are an integral element in the statutory scheme. Furthermore, no weight need be given to the supposed revenue-producing intent of Congress. Since 1952 the Wagering Tax provisions have produced $115 million in taxes.[10] The Court in both *Marchetti* and *Grosso* declined to impose restrictions. During that same period the Marihuana Tax provisions have produced less than $1 million in taxes.[11] In 1956 when Congress amended the Marihuana Tax Act it did not increase the rate of the tax but instead increased the penalties for violating the Statute and otherwise amended the Act to facilitate prosecution thereunder.[12] The only inference is that Congress assessed the "federal treasury" demand in this area

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[10] See the dissenting opinion of Chief Justice Warren in both *Marchetti* and *Grosso*, 390 U.S. at 82-3. Reports of the Internal Revenue Commissioner, 1952-1967.

[11] Reports of the Internal Revenue Commissioner, 1952-67. From 1942-1953 the Government reported the tax receipts from narcotics and marihuana on a combined basis. Therefore the amount indicated in the text is an approximate amount.

[12] The Narcoticcs Control Act of 1956 is described in the 1956 U.S. Code Cong. and Adm. News at pp. 3274, 3276-80.

at a low (if not zero) value, and assessed the federal and state prosecutory demand at a high (if not total) value (*Marchetti* v. *United States, supra,* at 59-60).[18]

D. A Determination in Petitioner's Favor on This Issue Should Serve to Reverse His Conviction on Both Counts.

The trial judge's charge allowed the jury to convict Petitioner of a violation of § 176a based upon his failure to pay the transfer tax required by § 4741. The Trial Judge charged as to § 176a (App. F, 97a-98a):

> "What that means, of course, is this: if the defendant be shown to have had the marihuana in his possession in the United States, such possession shall be deemed sufficient evidence to authorize conviction unless he explains his possession to the satisfaction of the jury. That means, unless he proves to your satisfaction that it was a *lawful and a legitimate* possession of the marihuana which he had." (Italics supplied.)

As will be described below the jury was then instructed that it could find Petitioner's possession not to have been "lawful" and "legitimate" by reason of his failure to pay the transfer tax. That is, the jury was told: (1) that conviction under the importation count (§ 176a) was authorized unless Petitioner proved that his possession was "lawful and legitimate"; and (2) that Petitioner's failure to pay the

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[18] The statute has often been characterized as a criminal statute rather than a revenue raising statute. See *e.g.*, The President's Commission on Law Enforcement and the Administration of Justice: A Task Force Report: Narcotic and Drug Abuse (1967). At page 13 it was stated as follows:

> The Act [The Marihuana Tax Act] raises an insignificant amount of revenue, exposes an insignificant number of transactions to public view, since only a handful of people are registered under the Act. *It has become in effect solely a criminal law imposing sanctions upon persons who sell, acquire, or possess marihuana* (italics supplied).

transfer tax made his possession "illegitimate". Indeed, the Trial Court stated:

> "[W]hen a transfer is made from one person to another such a transfer is taxed—a tax is imposed upon it—and the transferee should, if it be a *legitimate* transfer, receive a so-called order form, which is a form which may be procured from proper government officials to show that the transfer is, *in fact*, a *legitimate* one and that the tax has been paid and the transferee—that is the person who receives it, is obliged to keep that order form in his possession so that if the marihuana be discovered in his custody or in his possession he may show the order form to *show it was legitimate*" (italics supplied, App. F, 98a-99a).

It is respectfully submitted that a decision reversing the conviction under § 4744(a) must, regardless of the Court's determination of the issues presented under Question II, likewise, reverse the conviction under § 176a.

II. Petitioner was denied due process under the Fifth Amendment by the application, under the circumstances of this case, of the provisions of 21 U.S.C. § 176a, providing that an inference may be drawn respecting the illegal origin and nature of marihuana and knowledge thereof solely from possession.

Petitioner was also convicted of violating 21 U.S.C. § 176a—transporting unlawfully imported marihuana.

The essential elements of this crime are: (1) the transportation, or concealment of marihuana; (2) which marihuana has been imported; (3) knowledge of the unlawful importation thereof, and (4) intent to defraud the United States thereby.[14]

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[14] See, e.g., *Harris* v. *United States*, 359 U.S. 19, 23 (1959); *Griego* v. *United States*, 298 F.2d 845 (10th Cir. 1962); *Chaves* v. *United States*, 343 F.2d 85 (9th Cir. 1965), dealing with similar provisions of 21 U.S.C. § 174.

With respect to the proof to be adduced for the purpose of establishing these elements, § 176a provides:

> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

Petitioner has maintained that the use of this presumption, in lieu of evidence to establish: (1) the importation of the marihuana, (2) his knowledge of such importation and (3) his intent to defraud the United States, violated his right to due process of law under the Fifth Amendment.

A. The 21 U.S.C. § 176(a) Presumption is Arbitrary and Unreasonable.

The presumption here involved was added to § 176a in 1956. Prior thereto, a conviction under that section of the Marihuana Act could not be sustained in the absence of actual evidence that the marihuana had been imported into the United States and that the defendant knew of such importation. *Symons* v. *United States,* 178 F.2d 615 (9th Cir. 1949). The presumption was added by Congress, apparently without discussion or analysis (see 1956 U.S. Code, Cong. and Adm. News, p. 3274). The language simply copied the identical language relating to other narcotic drugs in 21 U.S.C. § 174. In *Yee Hem* v. *United States,* 268 U.S. 178 (1925), the Court upheld the presumption in § 174 with respect to opium.

The Court has propounded standards of inference and rationality by which such presumptions are to be weighed: "The constitutionality of the legislation depends upon the rationality of the connection 'between the facts proved and the ultimate fact presumed' " *United States* v. *Gainey,* 380 U.S. 63, 66 (1965). See also *Tot* v. *United States,* 319 U.S.

463 (1943). As reiterated recently in *United States* v. *Romano*, 382 U.S. 136, 139 (1965):

> "[A presumption will not be sustained if there is] 'no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. * * * [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.' "

Marihuana is totally different from opium and other "exotic drugs": it is widely grown in the United States and can be grown virtually anywhere in the world. At the trial of this case, witnesses for the Government confirmed that marihuana "will grow anywhere in the continental limits of the United States," and in the very county in which the trial took place (R. 165), and that its many varieties are widely grown (R. 186-187). Further expert testimony was introduced that marihuana "grows practically anywhere in the world, except in the Arctic" (R. 516). Indeed, the Trial Judge specifically stated with respect to the growth of marihuana in the United States, that "Nobody denies that . . . We all know it's a fact" (R. 187). The Trial Judge, however, refused to allow evidence with respect to the quantity of domestically grown marihuana (R. 165) and refused to allow testimony as to the comparative proportions of domestic and imported marihuana among users (R. 517).[15] To disregard both the conceded

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[15] It should be noted that, as opposed to "border" situations, where the marihuana has been acquired in what would appear to be an active border area, as that between Texas and Mexico, or in California, the fact is, for purposes of this issue, that Texas as the situs of this case is purely fortuitous. The Trial Judge assumed, and there was no serious dispute of the fact, that the marihuana here involved had been acquired by Petitioner in New York and not in Mexico or Texas (R. 133, 155-56, 313, 345, 357, 593).

fact of domestic growth and to remain blind to evidence of the extent thereof, is in essence to eliminate the importation element from § 176a and turn it into a statute punishing possession of marihuana, *per se*.[16]

In *Yee Hem* v. *United States*, 268 U.S. 178 (1925) the Court sustained a statutory provision making evidence of possession of opium sufficient to authorize conviction for concealing opium knowing it to have been illegally imported. There was no suggestion in the opinion, or in the briefs, of any significant possibility that opium found in this country has been domestically grown; counsel for petitioner pointed only to the possibility of lawful importation, a circumstance which the Court found "highly improbable." *Id.* at 184. As opposed to opium, the most that can be said about any particular quantity of marihuana is that it may or may not be imported.

With the exclusion of expert testimony as to the present comparative growth of domestic marihuana, with the inescapable fact of its ubiquitous nature, and the circumstances under which the specific marihuana was acquired in New York, there can be no constitutional justification, within the standards established by the Court, for the application of the statutory presumption as the *only* evidence of the essential elements of the crime charged.

The irrationality of the presumption may be demonstrated by an analysis of the process of compounding of inference upon inference, drawn from the bare fact of possession. Marihuana is possessed by defendant at a specific

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[16] This has been unequivocally condemned. *Roviaro* v. *United States*, 353 U.S. 53, 63 (1957). See also *Chavez* v. *United States*, 343 F.2d 85, 89 (9th Cir. 1965); *Erwing* v. *United States*, 323 F.2d 674, 679 (9th Cir. 1963); *Griego* v. *United States*, 298 F.2d 845 (10th Cir. 1962).

location in the United States (here, initial possession by defendant was in New York):

> (1) it is more likely than not that the marihuana was imported rather than that the marihuana was domestically grown (as substantial quantities are);
>
> (2) since the marihuana was imported, it is more likely that the importation was "contrary to law" rather than lawful;
>
> (3) since the importation was contrary to law and the marihuana was possessed by defendant, it is more likely that he knew it was imported contrary to law than that he either lacked knowledge on the subject or knew that the marihuana had been domestically grown (notwithstanding that he was the last in a chain of one or more transferees); and
>
> (4) since defendant knew the marihuana had been imported contrary to law and the fact is that he knowingly transported *or* concealed (without distinction between the two) the marihuana, it is more likely than not that he had an "intent to defraud the United States."

The evidentiary and logical gulf between possession of marihuana on the one hand, and illegal importation and knowledge thereof with intent to defraud on the other hand, cannot be rationally bridged by this statutory presumption. Moreover, a standard of reasonable doubt, rather than a test of likelihood should be applied to each of the foregoing inferences.

B. As Construed and Applied by the Lower Courts, Under the Circumstances of This Case, the Presumption Eliminated the Elements of Illegal Transportation and Knowledge Thereof from the Statute.

Even assuming that the Court were to hold that the presumption in § 176a is rational, it is submitted that the Trial Court's construction and application of the presumption to the facts of this case (which was adopted by the Court of Appeals) violates Appellant's right to due process of law under the Fifth Amendment in two respects:

(1) the courts below construed the presumption so that the only defense thereto was proof that possession was "lawful and legitimate" and thus read the requirements of illegal importation and knowledge thereof out of the statute and substantially mandated conviction under the importation count by reason of Petitioner's failure to pay the transfer tax;

(2) the courts below failed to provide any standards or definition of the words "to the satisfaction of the jury", as used in the phrase, "possession is sufficient evidence to authorize conviction *unless the defendant explains his possession to the satisfaction of the jury*" (italics supplied); thus leaving conviction in the uncontrolled discretion of the jury.

1. *Elimination of the elements of illegal importation and knowledge thereof from the statute*

The presumption was construed by the Trial Court as follows:

> "If the defendant be shown to have had the marihuana in his possession in the United States, such possession shall be deemed sufficient evidence to authorize conviction unless he explains his possession to the satisfaction of the jury. That means, unless he proves to your satisfaction that it was *a lawful and a legitimate possession* of the marihuana which he had." (Italics supplied; App. F, 97a-98a)

"[L]egitimate" was construed as follows:

> "The law recognizes that marihuana has some legitimate uses. Doctors, veterinarians, dentists and certain chemists, for experimentation purposes may secure from the proper officials of the United States Government the necessary permit to possess and handle marihuana for those legitimate purposes."
>
> ". . . [W]hen a transfer is made from one person to another such a transfer is taxed—a tax is imposed upon it—and the transferee should, if it be a *legitimate* transfer, receive a so-called order form, which is a form which may be procured from proper government officials to show that the transfer is, *in fact*, a *legitimate* one and that the tax has been paid and the transferee—that is the person who receives it, is obliged to keep that order form in his possession so that if marihuana be discovered in his custody or in his possession he may show the order form to *show it was legitimate.*" (Italics supplied; App. F, 98a-99a)

The Trial Court then applied the presumption to the facts of the case, in part as follows:

> ". . . the evidence from Dr. Leary himself, [was] . . . to the effect that . . . . he knew he had it [the marihuana] in his possession; *he knew it was in violation of the laws of the United States.*" (Italics supplied; App. F, 102a-103a)

No weight nor mention of the fact that the defendant had specifically denied knowledge of the source of the marihuana (App. F, 90a) was made in the Trial Court's construction or application of the presumption to the case. The Trial Court then proceeded to repeat the statutory presumption for the third and fourth times,[17] pointing out that "the Government is entitled to rely upon the presumption. . . . ." (App. F, 103a-104a).

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[17] The trial judge also twice read and once paraphrased without explanation the analogous tax presumption in 26 U.S.C. § 4744 (App. F, 98a-99a, 103a).

As so construed by the courts below and applied to the facts of the case, the presumption deprived Petitioner of his right to defend on the ground that he lacked knowledge of illegal importation. *Chavez* v. *United States,* 343 F.2d 85, 89 (9th Cir. 1965) is particularly relevant:

> "On the other hand, if once the presumption comes into operation, it can be rebutted only by proof of legal importation or *legal* possession, *the element of knowledge of illegal importation has been read out of the statute.* It is just as if, despite the specification of the three essential elements of the crime, no one of which necessarily involves the fact of possession, possession is nevertheless to be regarded, in and of itself, as a violation of the statute, unless proved to have been lawful. Yet this cannot be. In both Harris v. United States, 359 U.S. 19, 23, 79 S.Ct. 560, 3 L.Ed.2d 597, and Roviaro v. United States, 353 U.S. 53, 63, 77 S.Ct. 623, 1 L.Ed. 2d 639, it was expressly held that the statutory presumption does not reduce the offense to one of mere possession. See also, Rodella v. United States, 9 Cir., 286 F.2d 306, 311.
>
> "Moreover, such a reading of the statute would, as the district court recognized, render the presumption in practical effect conclusive."

In *United States* v. *Peeples,* 377 F.2d 205, 210 (2nd Cir. 1967), the Court stated:

> "[T]he jury must determine whether a defendant who is in possession of narcotics has knowledge of their unlawful importation irrespective of whether his possession is lawful or unlawful; ... In determining whether a defendant possessing narcotics had knowledge of their unlawful importation the jury *may,* of course, infer such knowledge from all the evidence before it including the fact of the possession. But the jury must also be left free to believe, if it wishes to believe it, any evidence indicating a defendant's lack of knowledge regardless of whether his possession was lawful; jurors should be instructed to acquit a defendant if satisfied that the defendant did not know the narcotic was imported."

The courts below thus construed and applied the presumption so as to render it in practical effect conclusive: possession is sufficient evidence for conviction unless the defendant shows his possession is "lawful" and "legitimate"; petitioner is not a lawful and legitimate possessor; in fact, he admitted he knew his possession "was in violation of the laws of the United States"; and his denial of knowledge of the source of the marihuana is irrelevant.

2. *Failure to provide guidelines for the words "to the satisfaction of the jury"*

Apart from this unconstitutional construction and application of the presumption, which left the jury little choice other than to convict, the courts below failed to construe the "satisfaction of the jury" phrase so as to provide any standards for its application. As was stated in *Chavez* v. *United States*, 343 F.2d 85, 88 (9th Cir. 1965):

> "The words 'to the satisfaction of the jury,' considered by themselves, provide nothing in the way of a general standard or guide. So far as this language is concerned, each jury would be left at large to decide what it will accept as an explanation of possession sufficient to avoid conviction. But clearly Congress did not intend to leave it to each jury to convict or acquit in accordance with its particular notion as to what kind of an explanation would be acceptable. See Rivera v. United States, 1 Cir., 327 F.2d 791, 792. Nor could such a construction of the statute withstand a constitutional challenge. Courts have therefore found it necessary to give meaning and content to this statutory language by specifying what kind of an explanation a jury may accept as adequate, and what kind it may reject as inadequate."

In summary, as the presumption was construed and applied by the Courts below, the elements of illegal importation and knowledge there were eliminated from the statute and Petitioner was tried on the legality of his possession and not for the crime charged.

CONCLUSION

The judgment below should be reversed in all respects.

Respectfully submitted,

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